Supreme Court, U.S.
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No. 98-149

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

COLLEGE SAVINGS BANK,

Petitioner,

v.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MICHIGAN, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, WEST VIRGINIA, WYOMING AND THE COMMONWEALTHS OF PENNSYLVANIA AND VIRGINIA IN SUPPORT OF RESPONDENTS

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INTRODUCTION AND INTEREST OF THE *AMICI*

Amici State of Ohio and 28 other States write in support of Respondent Florida Prepaid Postsecondary Education Expense Board ("Florida Prepaid"). *Amici* States urge the Court to hold that Congress lacks authority, by means of either the Commerce Clause or the Fourteenth Amendment, to abrogate a State's sovereign immunity for a claim of false advertising under the Lanham Act. In addition, the States urge that the constructive waiver doctrine first articulated in *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184 (1964), can no longer be sustained after this Court's holding in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and consequently should be overruled.

The States have an obvious interest in protecting their Eleventh Amendment immunity from suit in federal court. The *Amici* States therefore submit this brief for the Court's consideration.

SUMMARY OF ARGUMENT

In *Seminole Tribe*, this Court held that Congress lacks the power under Article I to abrogate a State's Eleventh Amendment immunity. In an effort to avoid the effect of this holding, College Savings Bank ("CSB"), Petitioner here, argues, first, that Congress has abrogated the immunity under section five of the Fourteenth Amendment, and, second, that Florida has waived its sovereign immunity pursuant to the *Parden* doctrine. Both arguments are incorrect.

1.a. A claim for false advertising (the only claim made here[1]) is not a "property" right that is protected by the Due

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[1]This case, No. 98-149, involves only a false advertising claim under the Lanham Act. A related case, *Florida Prepaid Postsecondary Expense*

Process Clause of the Fourteenth Amendment. As the United States acknowledges, a false advertising claim does not have the quintessential hallmark of property, the right to exclude others. *See* U.S. Br. pp. 30-33.

b. Even if the claim could somehow be construed as a property right, Florida (as well as most other States) provides both "takings" and tort remedies in state court. (*See* Appendix B to Brief for *Amici* States in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531). Therefore, Florida has not violated due process, and Congress cannot "enforce" the Due Process Clause under section five of the Fourteenth Amendment.

2.a. Nor has Florida waived its sovereign immunity. The *Parden* doctrine has lost its constitutional moorings after the Court's holding in *Seminole Tribe*. In *Parden*, the power to constructively waive the States' Eleventh Amendment immunity was based on Congress' power to regulate interstate commerce, as well as the assumption that the States surrendered immunity by granting Congress the interstate commerce power when ratifying the plan of the Constitution. This assumption, however, was found to be erroneous in *Seminole Tribe*, which held that the powers granted to Congress in the Commerce Clause of Article I, §8 were never intended to deprive States of immunity from suit in federal courts. In other words, when exercising Commerce Clause power, Congress must accept the existing fact of state sovereign immunity. Given the holding and reasoning of *Seminole Tribe*, Congress cannot attempt to use its Commerce Clause power to negate state sovereign immunity. It follows, therefore, that the idea of constructive waiver

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Board v. College Savings Bank, No 98-531, to be argued the same day as No 98-149, involves a patent infringement claim arising from the same dispute between Florida and CSB.

articulated in *Parden* is no longer tenable, and hence the doctrine must be abandoned.

b. Even if *Parden* retains some viability after *Seminole Tribe*, a State does not constructively waive its immunity by adopting a legislative program, particularly in a field of regulatory authority of traditional state concern, such as education. States necessarily have the legislative discretion to determine, without risk to their Eleventh Amendment immunity, what public policies would best serve the citizens of the State. In this case, the State of Florida has adopted a legislative program for making higher education financially affordable for its citizens. As a result, the United States and CSB argue that the State voluntarily chose to waive its Eleventh Amendment immunity with respect to false advertising claims under the federal Lanham Act that might arise against the State in connection with its financial aid program.

This argument, however, turns upside-down the crucial principles of federalism that underlie the Eleventh Amendment. Sound principles of federalism do not permit that, simply by choosing an innovative method to fulfill its core responsibilities in the field of education, a State has waived its sovereign immunity under the Eleventh Amendment. Instead, a State, as a "laborator[y] for experimentation," *United States v. Lopez*, 514 U.S. 549, 581 (Kennedy, J., concurring), must remain free to adopt whatever policies and programs it thinks best for its citizens, without fear that adopting such legislation is a constructive waiver of sovereign immunity.

ARGUMENT

I. CONGRESS HAS NO POWER UNDER THE FOURTEENTH AMENDMENT TO SUBJECT STATES TO FALSE ADVERTISING CLAIMS IN FEDERAL COURT.

A. A Claim For Damages For Unfair Trade Practices Is Not A Property Right Protected Under The Due Process Clause Of The Fourteenth Amendment.

The only provision of the Lanham Act that is alleged to have been violated in this case is the prohibition on false representations about one's own product. *See* Petitioner's Brief, p. 2. No violation of trademark or other provision of the Act is alleged here. Although CSB alleges some pecuniary loss from the alleged false advertising, its claims simply do not rise to a "property" right that might be protected under the Fourteenth Amendment. The United States, otherwise supporting CSB, acknowledges that there is no "property" interest here, and thus no violation of due process. U.S. Br., p. 30-33. Since the United States is entirely persuasive on this point, there is no need to repeat its cogent argument here.

CSB, however, argues that the tort of unfair competition protects property rights in its business. Pet. at 16; Br. at 13-21. Although in a general sense it may be true that the protection of business interests is an intent of the law, CSB's claims are not thereby raised to a constitutional level. Virtually every tort protects some "property" or "liberty" interest. It does not follow, however, that there is a constitutional right to a tort claim for every possible injury to

a property right. For example, a person still owns a house as property, even if her State does not recognize a nuisance claim when a neighbor makes too much noise. The house owner does not have a *property* right that a State's law uphold a particular kind of tort claim. Likewise, a business owner does not have a *property* right to the tort of unfair competition.

This point is true even when a State is the alleged tortfeasor. Because there is no property right to legal recognition of the tort of unfair competition, a State does not deprive the business owner of property by allegedly committing that tort. Thus, CSB's claim that there has been a deprivation of "property" for purposes of the Fourteenth Amendment rests on an analytic error.

B. Even If A Property Right Were To Exist, The States Provide Due Process In State Courts, And Therefore No Violation Of Due Process Exists.

Even if a claim for unfair competition could be construed as a property right for purposes of due process, Congress could not "enforce" the right against the States unless there is a violation of due process. Because Florida, as well as most other States, provide due process for deprivations of property, there is no violation of due process and thus no need for Congress to "enforce" the Due Process Clause.[2]

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[2]The argument set forth in this section of this brief parallels a similar argument made in the States' *amicus* brief in No. 98-531. In making this argument, the States do not mean to suggest that a State's ability to assert immunity in federal court is necessarily contingent on a comparable remedy in state court. It may be that States have the sovereign right to remain immune from suit in both federal and state

It is well established that a State has not violated due process just because there is a pending allegation that the State has committed a tort of some kind. *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 540 (1981), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986)(negligence does not qualify as a deprivation for purposes of Due Process Clause). *See also Hudson v. Palmer*, 468 U.S. 517 (1984). Instead, a due process violation occurs, if at all, only if a State fails to afford a procedure for presenting the tort claim. The State in *Parratt* did provide a tort remedy against the State, and the Court held that because this remedy "could have fully compensated the respondent for the property loss he suffered," it was "sufficient to satisfy the requirements of due process." 451 U.S. at 543-44. *See also Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985) (takings claim was premature "because the Constitution does not require pretaking compensation, and is instead satisfied by a reasonable and adequate provision for obtaining compensation after the taking").

The same point is true in this case. Petitioner CSB, a bank, claims that Respondent, a state agency charged with the responsibility of providing financial aid to college-bound children of the state's citizens, has engaged in the tort of false advertising in violation of section 43(a) of the Lanham Act, 15 U.S.C. §1125(a). While the false advertising claims remain very much in dispute, the State of Florida has made available in its own courts a process for adjudicating both tort and "takings" claims. Fla. Stat. § 768.28 (1998); Fla. Const.

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court. *See* States' *amicus* brief in *Alden v. Maine*, No. 98-436, *cert. granted*, 119 S.Ct. 443 (November 9, 1998).

Art. X, § 6(a).[3] In other words, Florida makes available the same types of procedures involved in *Parratt* that satisfied due process.

In sum, there has been no deprivation of property without due process and, therefore, no violation of the Fourteenth Amendment. Because there is no Fourteenth Amendment violation, there is nothing for Congress to remedy pursuant to its authority under section five of the Fourteenth Amendment. Under the principles espoused in *City of Boerne v. Flores*, 521 U.S. 507 (1997), Congress may not require Florida or any other State to submit to a federal court procedure for adjudicating an unfair competition claim against the State just because Congress thinks that the federal process would be preferable to the state court process already available.

II. A STATE DOES NOT CONSTRUCTIVELY WAIVE ITS ELEVENTH AMENDMENT IMMUNITY BY FINANCING HIGHER EDUCATION FOR ITS CITIZENS.

A. The *Parden* Doctrine Of Constructive Waiver Is Inconsistent With *Seminole Tribe*.

The theory of constructive waiver articulated in *Parden* is that a State waives its Eleventh Amendment immunity simply by engaging in an activity that Congress has the power to regulate under the Interstate Commerce Clause.

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[3]Indeed, most States have provisions for "takings," inverse condemnation and/or tort claims in some forum. *See* Appendix B to Brief for Amici States in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, No. 98-531.

See Parden, 377 U.S. at 190-91. This theory, however, is untenable after *Seminole Tribe*. The reason is that the *Parden* theory of constructive waiver is essentially the same as the theory of congressional power to abrogate sovereign immunity—now discredited by *Seminole Tribe*.

If a State were to constructively waive its immunity just by engaging in an activity within the scope of Congress's interstate commerce power, then Congress can negate the State's sovereign immunity simply by regulating pursuant to this power. This negation of sovereign immunity is just another term for congressional "abrogation" of sovereign immunity. There is no legal or policy reason to presume that a State engaging in an activity that Congress has the power to regulate under the Interstate Commerce Clause actually wishes to relinquish its Eleventh Amendment immunity. But if Congress, just by exercising the commerce power, can force a State to lose its immunity when the State undertakes an activity within the scope of the power, then Congress effectively has the authority to abrogate a State's Eleventh Amendment immunity whenever it regulates pursuant to the Interstate Commerce Clause.

The dissent in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)—a dissent that spoke for four present members of this Court—recognized this essential equivalence between the *Parden* theory of constructive waiver and the idea of congressional abrogation of sovereign immunity. "At bottom, then, to acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers." *Id.* at 44. As the *Union Gas* dissent also recognized, if the idea of congressional abrogation of sovereign immunity under the Commerce

Clause is constitutionally incorrect, then so too must be *Parden*'s theory of constructive waiver. "There are obvious and fatal difficulties in acknowledging [the *Parden* theory of constructive waiver] if no Commerce Clause power to abrogate sovereign immunity exists." *Id.* at 43.

Consequently, because constructive waiver under *Parden* is the same as congressional abrogation of sovereign immunity, *Parden's* theory of constructive waiver cannot survive this Court's decision in *Seminole Tribe*. As this Court well knows, *Seminole Tribe* held that Congress lacks the power to abrogate a State's Eleventh Amendment immunity just because a State has undertaken an activity that falls within the scope of Congress's power under the Commerce Clauses of Article I, §8. Thus, given the equivalence between the idea of abrogation and *Parden*'s theory of constructive waiver, it necessarily follows from this Court's decision in *Seminole Tribe* that a State does not constructively waive its Eleventh Amendment immunity simply because the State has undertaken an activity that falls within the scope of congressional power under the Interstate Commerce Clause.

It is not just the holding of *Parden* that is inconsistent with *Seminole Tribe*. Rather, it is the whole vision of federalism underlying the *Parden* decision that contradicts the correct understanding of federalism articulated in *Seminole Tribe*. *Parden* rested its theory of constructive waiver on a belief that the States already had surrendered their sovereign immunity with respect to any activity regulable by Congress pursuant to the Interstate Commerce Clause. According to *Parden*, this surrender of sovereign immunity occurred at the time of the State's ratification of the Constitution. "[B]y empowering Congress to regulate [interstate] commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden*, 377 U.S. at 193. But, as *Seminole Tribe* correctly

observed, the States did not subject themselves to suit in federal court by ratifying Congress's power to regulate interstate commerce. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 517 U.S. at 72.

Because *Parden*'s theory of constructive waiver is no longer tenable after *Seminole Tribe*, the Court in this case should take the occasion to overrule *Parden* explicitly. Doing so would not disrespect the values of *stare decisis*. Indeed, *Parden* has been overruled in part before. In *Welch v. Department of Highways & Public Transportation*, 483 U.S. 468 (1987), this Court overruled *Parden* insofar as it is inconsistent with the constitutional principle that Congress must articulate a "clear statement" of an intent to deny a State its Eleventh Amendment immunity.[4]

Several other pre-*Seminole* decisions of this Court also cast doubt on *Parden*'s theory of constructive waiver. *See Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973) (no waiver of Eleventh Amendment immunity from suit by employees of State's nonprofit institutions); *Edelman v. Jordan*, 415 U.S. 651 (1974) (mere fact that a State participates in a program partially funded by the federal

[4]In *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), this Court declined to overrule *Parden's* interpretation of the particular Act of Congress involved in that case. *Hilton*, however, predates *Seminole Tribe* and thus serves as no basis for sustaining *Parden's* misunderstanding of the relevant *constitutional* principles involved in construing the relationship between Article I and the Eleventh Amendment. *Seminole Tribe*, moreover, overruled *Union Gas* as necessary to vindicate the correct understanding of the Constitution and its fundamental principles of federalism.

government does not manifest consent to be sued in federal court). Thus, a review of post-*Parden* decisions reveals that case to have been an anomaly from the start. Now that the Court has come to recognize that the entire premise of *Parden* contradicts a proper understanding of Eleventh Amendment immunity, the Court should simply abandon *Parden* as an erroneous and eviscerated aberration.

B. Assuming *Arguendo Parden* Survives *Seminole Tribe*, It Cannot Apply Where, As Here, A State Adopts Policies And Programs In A Field Of Primary State Concern.

Parden, this Court will recall, involved a State's decision to operate a railroad on a "for profit" basis. 377 U.S. at 185. This case, by contrast, involves a State's decision to offer its citizens a form of financial aid for higher education, so as to increase the opportunities for their children to attend college or university. Thus, in terms of the relative balance of state and federal interests, the two cases could scarcely be more different.

In *Parden*, the operation of a "for profit" railroad could not be considered an essential state function, where the inevitable interconnectivity of railroad lines across state borders had given the federal government a strong interest in the regulation of railroads since their inception. By contrast, a vitally important function of state government is the provision of educational opportunities for its citizens, and the States always have had, and continue to have, primary authority in this field. *See Lopez*, 514 U.S. at 564 (education is a field "where States historically have been sovereign"); *id.* at 580 (Kennedy, J., concurring) ("it is well established that education is a traditional concern of the States"). *See also Brown v. Board of Education*, 347 U.S. 483, 493 (1954)

("education is perhaps the most important function of state government"). Moreover, the federal government has but a slight interest in subjecting a State to suit in federal court for false advertising claims arising from the State's publicity of its financial aid programs, for which only the State's own citizens and their children are eligible. Thus, assuming arguendo the *Parden* theory of constructive waiver were somehow to survive *Seminole Tribe*, it cannot apply here, where the State has adopted a program in an area of core state concern, and where the federal interest involved is especially tenuous.

This proposition is valid notwithstanding that Florida's financial aid program has attributes resembling practices of private-sector financial institutions. In an effort to analogize this case to *Parden*, CSB and the United States suggest that Florida's financial aid program is a for-profit enterprise. *See* U.S. Br. at 24, 27 (repeatedly characterizing the program as "commercial" and "highly profitable"); CSB Br. pp. 38-41. But this suggestion is inaccurate. Florida's program is not a "for-profit" enterprise. The money generated by contracts goes into a separate trust fund for the exclusive use of Florida Prepaid to honor the contracts for college tuition as they become due. Fla. Stat. § 240.551. Any surplus left at the end of a fiscal year is placed in a contingency fund, presumably to guard against years of unusually high demand, and as a hedge against losses due to inflation or investment. *Id.* No money ever goes to the general state treasury, but is kept in the trust fund for the exclusive use of the program.

Moreover, the *Amici* States would suggest that the correct way to understand Florida's program differs from the description offered by the United States, which writes that Florida has entered "interstate commerce" to compete commercially "in the marketplace" with private lenders. *See* U.S. Br. at 28-29. We submit, however, that Florida does not

"operat[e] in interstate commerce" in any meaningful sense when, as here, it limits its financial aid program only to Florida residents and their children. While it may be that Congress has the power to regulate in-state financing practices on a theory that they "substantialiy affect" interstate commerce, *Lopez*, 514 U.S. at 559, it is still wrong to characterize in-state financing as "operating in interstate commerce." Florida's publicity of its financial aid program for the children of in-state residents is not the kind of national advertising campaign—like those conducted by the nation's major manufacturing or retailing companies—that gives rise to the need for a federal false advertising claim under the Lanham Act.

In addition, when the United States says that Florida is in "commercial" competition with private firms and thus needs to be subjected to false advertising suits in federal court so as to prevent the State from having a "competitive advantage," U.S. Br. p. 29-30, the United States apparently misunderstands both the consequences of Eleventh Amendment immunity and the State's role in providing educational opportunities for its citizens. First, if Florida prevails in its assertion of Eleventh Amendment immunity, as it should, it will obtain no significant "competitive advantage" against private firms as a result of this immunity. The reason is simple: even if the State is immune from suit in *federal* court because of the Eleventh Amendment, a victim of any alleged false advertising by the State can bring a claim for relief in state court. *See* Part I. B and n. 3, *supra.* This state-court remedy will put any "private competitor" in substantially the same position as if relief against the State were available in federal court. Thus, contrary to the suggestion of the United States, there is no lopsided advantage for a state financial aid agency as a result of the Eleventh Amendment.

In any event, it is mistake to think that a State, *when it acts to provide educational opportunities for its citizens*, is obligated to limit itself so its educational programs have no "competitive advantage" over educational programs that might be offered in the "marketplace" by private institutions. States have long operated their own schools, colleges, and universities. These institutions in some sense "compete" for students with private schools, colleges, and universities. Nonetheless, the State's institutions have a major "competitive advantage" insofar as they receive substantial subsidies from the State, generated by the State's tax revenues. No one could suggest that there is anything inappropriate about this "competitive advantage," if one should even use the term when comparing public and private schools. Instead, the proper way to understand the field of education, given the State's obvious primary responsibility for assuring educational opportunities for its citizens, is that private entities enter the field at their own risk, knowing that public educational institutions may well have significant advantages in attracting families—advantages derived from the State's unique taxing and regulatory powers.

This point applies just as much when a State operates its own program for providing financial aid to attend a college or university as when the State operates the college or university itself. The State's own financial aid program is one of the State's chosen ways to make educational opportunities more available for the citizens of the State and their children. In adopting its own financial aid program, the State may choose to rely (to a greater or lesser extent) on its own special taxing and regulatory powers. When the State does so, private entities that wish to offer an alternative financial aid program enter the educational arena (or "marketplace," if one insists on that term) knowing well that the State necessarily has the authority to rely on its sovereign powers to enhance educational opportunities for its people.

In sum, this case involves a State engaged in one of the most important functions of a State: enhancing educational opportunities for its citizens and their children. Thus, assuming *arguendo* that the *Parden* constructive waiver doctrine retains some validity after *Seminole Tribe*—a proposition the *Amici* States vigorously dispute—it has no applicability in this case. In no event can the idea of constructive waiver apply where a State has exercised legislative discretion in a field long recognized to be a primary concern of the States—and where the basis for federal jurisdiction under the Interstate Commerce Clause is slight. Simply put, Florida did not constructively waive its Eleventh Amendment immunity by choosing to operate and publicize its financial aid program.

C. The Theory Of Constructive Waiver Proposed By The United States Contradicts Fundamental Principles Of Federalism.

The United States proposes the following test for application of the constructive waiver doctrine: "an implied waiver of Eleventh Amendment immunity may be found . . . [if] a State's decision to engage in the specified conduct may realistically be deemed a voluntary choice." U.S. Br. at 28 n. 8. We submit, first, that this proposed test is inconsistent with the reasoning of *Seminole Tribe* and the important principles of federalism that animated that decision. *Seminole Tribe* did not rule that Congress lacks the power to abrogate Eleventh Amendment immunity only when States have no choice but to enter a domain subject to federal regulation. On the contrary, in *Seminole Tribe* this Court correctly held that Congress has no power whatsoever under Article I to abrogate a State's sovereign immunity, because the States did not relinquish that immunity when they granted Congress its

Article I powers. Thus, the reasoning of *Seminole Tribe* applies just as much to the "voluntary choices" a State might make pursuant to its sovereign powers as to any involuntary acts a State might need to undertake.

The position of the United States seems to equate a State's voluntary decision to adopt a legislative program with a voluntary waiver of sovereign immunity. But no such equation would be proper. Just because a State voluntarily chooses to enact a piece of legislation that the State thinks is in the best interests of its people, it does not follow that the State necessarily has chosen to abandon its sovereign immunity with respect to any federal claim arising from the State's enactment. To so hold would be to return essentially to the idea of congressional abrogation—that Congress can strip a State of its Eleventh Amendment immunity whenever a State chooses to enact legislation that falls within the ambit of congressional authority under Article I (even if the State has no desire to abandon its Eleventh Amendment immunity by adopting the legislation in question). Yet this kind of argument is precisely what the Court rejected in *Seminole Tribe*. For this reason alone, the United States' proposed test for constructive waiver is a non-starter.

The proposed test, moreover, would seriously undermine the sovereignty of States to make discretionary policy choices pursuant to their regulatory powers. As such, the proposal is fundamentally inconsistent with general principles of federalism, principles imbedded in the Constitution and previously sustained by this Court. *See, e.g., Printz v. United States*, 117 S.Ct. 2365, 2381 (1997) ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.") *See also New York v. United States*, 505 U.S. 144, 177 (1992) ("functioning as a sovereign" requires States to have the policy discretion to make

legislative choices that fulfill "a state government's responsibility to represent and be accountable to the citizens of the State"). Accordingly, the proposal should be rejected in no uncertain terms.[5]

Furthermore, it is not at all clear that, in the words of the United States (U.S. Br. at 24), Florida could "realistically choose to abandon" the financial aid program at issue here. This program, after all, was the state legislature's policy choice for improving access to higher education, after considering the various policy options, including budget constraints and other public priorities. Surely, the United States is not suggesting that Florida could or should abandon its commitment to expanding educational opportunities for its citizens and their children.

Instead, the United States seems to say that Florida could abandon its chosen means for improving educational

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[5]The United States cites a series of cases in an effort to support its proposed theory of constructive waiver. None of these cases, either individually or in connection with any other, support a finding of constructive waiver in this case. As an initial matter, the States would not concede that any of the cases establish waiver of any kind. All but one of these cases are lower-court decisions that the States will vigorously contest when and if these issues are before this Court. (The U.S. cites, at 14-15, a case from this Court involving a State's receipt of federal funds, *South Dakota v. Dole*, 483 U.S. 2031 (1987), but that case did not involve the Eleventh Amendment.) The one cited case from this Court involving the Eleventh Amendment obviously predates *Seminole Tribe*, and should not survive it for reasons stated in Part II.A., *supra*. *See* U.S. Br. pp. 16-17 discussing *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959). Even if *Petty* survives *Seminole Tribe*, the decision to enter an interstate compact is very different from an independent state legislative act in an area traditionally understood to be within the State's province. The other cases are equally distinguishable as examples of a State knowingly and voluntarily entering into a type of "joint venture" or "contract" with the federal government, or availing itself of a federal forum.

opportunities. The United States describes Florida's program as "neither a traditional nor necessary means for facilitating the State's educational mission." U.S. Br. at 27. But the implication of this suggestion is that, for purposes of Eleventh Amendment immunity, a State is confined to exercise its sovereign policymaking powers in only certain circumscribed ways. This suggestion is untenable.

When a State acts in an area of core responsibility, like education, its sovereignty does not depend upon whether the State adopts a program that is traditional or necessary. Instead, the State has the sovereign authority to exercise its discretion to make policy in innovative or experimental ways. Good government demands as much. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (citations omitted). Furthermore, the United States, as a sovereign power like the several States, would not tolerate a description of its sovereignty as limited to traditional and necessary measures. Thus, when the State of Florida chooses to adopt a program for financing access to higher education that is innovative from an historical perspective, the State is exercising its sovereign authority in the field of educational policy to the same extent as when the State chooses to operate a traditional public school or university.

Moreover, not even the operation of traditional public schools or universities can be considered a "necessary means" of securing educational opportunities for the people of a State. As the growing "charter school" movement makes plain, a State could privatize the operation of public schools. Indeed, given the modern trend toward privatization, a State could "abandon" most public functions, if the State concludes

that subsidizing or contracting with private entities is more efficient or otherwise better public policy than operating public entities itself. In terms of the proposed test for constructive waiver offered by the United States, even the operation of traditional public schools is a "voluntary choice," given the fact that State alternatively could choose to rely on subsidization (and regulation) of private schools as a means of providing for educational opportunity.

This point, however, further confirms just how inappropriate the proposed test is. To the contrary, a State's ability to assert Eleventh Amendment immunity does not turn on whether the State has exercised a "voluntary choice" in a domain, such as education, over which the State has the discretion to make a wide variety of policy choices. When a State chooses one policy alternative in favor of another, it does so based on its considered judgment that the chosen alternative is in the best interest of the people of the State. If state sovereignty means anything, it means that a State has the sovereign power to exercise this discretion to adopt innovative programs, as well as traditional ones, without risk of losing its Eleventh Amendment immunity.

This Court need not even reach the question of adopting a post-*Seminole* test for constructive waiver if, as we have argued in Point II.A., the entire theory of constructive waiver does not survive *Seminole Tribe*. But assuming, solely for sake of argument, there is a need to consider constructive waiver after *Seminole Tribe*, the result cannot be the test proposed by the United States. No sound understanding of federalism could tolerate a constructive waiver doctrine that deprived a State of its sovereign immunity just because it chose to operate a program to provide its citizens and their children with financial aid for higher education.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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